(2)

Supreme Court, U.S.
FILED
DEC 2 1997
CLERK

No. 97-751

In The

Supreme Court of the United States

October Term, 1997

ROBIN JOY SHAHAR,

Petitioner,

v.

MICHAEL J. BOWERS, INDIVIDUALLY AND THURBERT E. BAKER IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF GEORGIA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

THURBERT E. BAKER
Attorney General
*MICHAEL E. HOBBS
Counsel to the Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-2218

Counsel for Respondents

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

34 pp

QUESTIONS PRESENTED

1. Were the requirements of *Pickering v. Board of Education*, 391 U.S. 563 (1968) fulfilled by the court of appeals when it assumed, without deciding, the existence of a protected right of association in the context of this case, considered the objective characteristics of that association, and assigned the association substantial weight in balancing it against the Respondents' interests in the efficient and credible operation of the Georgia Department of Law?

2. Did the court of appeals properly consider acts and events which occurred after the withdrawal of the offer of employment to Petitioner in weighing the reasonableness of Respondent Bowers' predictions of disruption and concerns for the effective, efficient and credible operation of the Georgia Department of Law?

3. Did the court of appeals properly conclude that Respondent Bowers' withdrawal of the offer of employment to Petitioner was caused by her actions in holding herself out as married to another woman as opposed to some generalized and unsubstantiated animus against homosexuals?

LIST OF PARTIES

The parties are Petitioner Robin Joy Shahar, Respondent Michael J. Bowers, individually, and Respondent Thurbert E. Baker, in his official capacity as Attorney General of Georgia. Attorney General Baker in his official capacity was added as a party to this action by operation of law when Respondent Bowers resigned as Attorney General in May 1997. Rule 25(d)(1), Fed. R. Civ. P.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved ... 1

Statement of the Case 3

A. Statement of Facts 3

B. Proceedings Below 9

Reasons for Denying the Writ 11

A. Introduction 11

I. This Case Does Not Present Issues Worthy Of Review By This Court 11

II. The Court Of Appeals Did Not Err In Assuming The Existence Of A Constitutionally Protected Right Of Intimate Association In The Context Of This Case, Assigning That Assumed Right Substantial Weight, And Placing It In The *Pickering* Balance 12

A. Reserving Judgment On The Existence Of The Asserted Rights, And Instead Assuming Their Being, Was A Proper Exercise Of The Court Of Appeals' Discretion To Avoid Premature Constitutional Adjudication 13

TABLE OF CONTENTS – Continued

Page

B. The Court Of Appeals Did Not Err In Weighing Petitioner's Asserted Intimate Association..... 16

C. The Court Of Appeals Did Not Err In Weighing Shahar's Asserted Expressive Association 18

III. The Court Of Appeals Properly Considered Respondent's Reasonable Predictions And Information Which Was Unknown To Respondent At The Time The Offer Of Employment Was Withdrawn 20

IV. Respondent Bowers' Withdrawal Of Shahar's Job Offer Was Based Upon Her Actions In Holding Herself Out As Married To Another Woman, And Was Not Precipitated By Some Generalized Animus Against Homosexuals..... 23

Conclusion 25

TABLE OF AUTHORITIES

Page

CASES

Board of Directors of Rotary International v. Rotary Club, 481 U.S. 537 (1987) 14

Bowers v. Hardwick, 478 U.S. 186 (1986)... 14, 15, 22, 23

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1981) 16

Connick v. Myers, 461 U.S. 138 (1983)..... 19

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) 14

Griswold v. Connecticut, 381 U.S. 479 (1965)..... 14

Kadrmas v. Dickinson Public School, 487 U.S. 450 (1988) 25

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) 16

Mayer v. Nebraska, 262 U.S. 390 (1923)..... 15

Maynard v. Hill, 125 U.S. 190 (1888)..... 14

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 15

Palko v. Connecticut, 302 U.S. 319 (1937)..... 15

Pickering v. Board of Education, 391 U.S. 563 (1968) 10, 12, 18, 25, 26

Rescue Army v. Municipal Court, 331 U.S. 549 (1947) 16

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955)..... 26

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 14, 18, 19

Romer v. Evans, 517 U.S. ___, 116 S. Ct. 1620 (1996) 24, 25

TABLE OF AUTHORITIES – Continued

Page

Shahar v. Bowers, 70 F.3d 1218 (11th Cir. 1995), *vacated and rehearing en banc* granted, 78 F.3d 499 (11th Cir. 1996) 10

Shahar v. Bowers, 836 F. Supp. 859 (N.D. Ga. 1993) ..9, 19

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) 15

Smith v. Organization of Foster Families, 431 U.S. 816 (1977) 15

United States v. Johnson, 268 U.S. 220 (1925) 12

Washington v. Glucksberg, 117 S. Ct. 2262 (1997)..... 14

Waters v. Churchill, 511 U.S. 661 (1994) 18, 20

Zablocki v. Redhail, 434 U.S. 374 (1978) 14, 15

STATUTES

O.C.G.A. § 16-6-2..... 8

O.C.G.A. § 45-15-3..... 2

O.C.G.A. § 45-15-10..... 2

O.C.G.A. § 45-15-30.....3, 4

O.C.G.A. § 45-15-31..... 3

O.C.G.A. § 45-15-31(a) 4

28 U.S.C. § 1254(a) 1

Ga. Const., Art. V, Sec. III, Paras. I, IV 2, 3

TABLE OF AUTHORITIES – Continued

Page

RULES

Rule 25(d)(1), Fed. R. Civ. P. ii

Rule 10(a), Supreme Court Rules 12

OPINIONS BELOW

The decision of the *en banc* court on the merits is reported at 114 F.3d 1097 (11th Cir. 1997). (Pet. App. 10a) The decision of the *en banc* court denying rehearing and Shahar's motion to supplement the record is reported at 120 F.3d 211 (11th Cir. 1997). (Pet. App. 1a) The panel decision of the court of appeals is reported at 70 F.3d 1218 (11th Cir. 1995) (Pet. App. 94a) which was vacated, 78 F.3d 499 (11th Cir. 1996). (Pet. App. 93a.). The district court's decision is reported at 836 F. Supp. 859 (N.D. Ga. 1993). (Pet. App. 131a)

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(a). Judgment in the *en banc* court was entered on May 30, 1997. A timely petition for rehearing was filed and was denied on August 1, 1997. A timely petition for a writ of certiorari was filed with this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in pertinent part:

   "Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech . . . ; or the right of the people peaceably to assemble. . . . "

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

"No state shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Art. V, Sec. III, Para. IV of the Constitution of Georgia of 1983 provides in pertinent part:

"The Attorney General shall act as the legal advisor of the executive department, shall represent the state in the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor. . . . "

4. Official Code of Georgia Annotated (O.C.G.A.) § 45-15-3:

"It is the duty of the Attorney General:

(1) When required to do so by the Governor, to give his opinion in writing . . . on any question of law connected with the interest of the state . . . ;

* * *

(3) When required by the Governor, to participate in, on behalf of the state, all . . . criminal actions . . . or civil actions to which the state is a party;

(4) To act as the legal advisor of the executive branch; . . .

* * *

(6) To represent the state in all civil actions tried in any court. . . . "

* * *

5. O.C.G.A. § 45-15-10 (Attorney General authorized to prosecute in the criminal courts any state official,

person, firm or corporation violating criminal statutes while dealing with or for the state).

6. O.C.G.A. § 45-15-30 (Attorney General, as head of Department of Law, authorized to appoint such deputy attorneys general and assistant attorneys general as he deems necessary).

7. O.C.G.A. § 45-15-31 (All assistant attorneys general shall be appointed for such periods of time as Attorney General deems advisable. "Any assistant attorney general . . . not under the merit system may be removed by the Attorney General.")

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Respondent Bowers served as Attorney General of Georgia from 1981 until June 1, 1997. He was elected by the citizens of Georgia in four consecutive elections to represent them as the chief legal officer of the state and as head of the Department of Law. *See* Ga. Const., Art. V, Sec. III, Paras. I, IV. The Attorney General represents the state before the Georgia Supreme Court in all capital felonies, and in all civil actions brought against the state, its agencies or officials. He is authorized to prosecute various criminal actions involving the state, and to investigate and prosecute any criminal action at the request of the Governor. Additionally, the Attorney General serves as the chief legal advisor to the executive branch of state government. *Id.* As head of the Department of Law, he is responsible for assuring the integrity of and maintaining public confidence in the Department. (Bowers Dep. 77)

The Attorney General is authorized to employ such deputy attorneys general and assistant attorneys general as he deems "necessary to carry out the functions of the Attorney General and Department of Law." O.C.G.A. § 45-15-30. These deputies and assistants may be hired for such periods of time as the Attorney General deems advisable and "may be removed by the Attorney General." O.C.G.A. § 45-15-31(a).

These deputies and assistants, as representatives of the Attorney General, also represent the legal interests of the state, and "speak on behalf of the state." (Manis Dep. 36) Their conduct thus reflects upon the Attorney General and is often attributed to his office. (Bowers Dep. 86) In recognition of this, the Office Procedures Manual for the Department of Law states, "[a]s employees of the Department of Law, our actions reflect not only on the Attorney General, but on the client and state government as a whole." (R2-35-Exh. A)[1]

In 1990, Petitioner Robin Joy Shahar, then known as Robin Brown, was hired as a summer clerk in the Law Department after her second year at Emory University School of Law. During that summer, Petitioner told her clerkship supervisor that she was a lesbian. (Shahar Dep. 53-55) Her work received generally good reviews during her summer employment and she was offered a position of staff attorney upon her graduation from law school.

---

[1] Record citations are to the record volume, document number and subpart, page number or exhibit. Deposition citations are by the deponent's name and deposition page number. Citations to the Petition's Appendix are by appendix page numbers.

(R-1-2-Exh. A) She accepted the offer and was scheduled to start work in September 1991. (Coleman Dep. 32)

During the summer before she was to enter service as a staff attorney in the Law Department, Shahar decided to "marry" her partner in a same-sex ceremony to be performed by a rabbi within the "Reconstructionist Movement" of Judaism. She invited approximately 250 people, including two lawyers in the Department of Law, to what the invitations characterized as a "Jewish, lesbian-feminist, out-door wedding." (Shahar Dep. 30; Exh. 1) Numerous practicing attorneys, colleagues from Emory University, and some of Shahar's partner's co-workers at the Atlanta Federal Penitentiary were also on the guest list. (R2-35-Exh. F at 1; Shahar Dep. 36-37) The upcoming "marriage" was announced to the congregation of Shahar's synagogue. The ceremony was an outdoor affair, held in a public park in South Carolina. (Shahar Dep. 38)

Approximately nine months prior to her ceremony, after having received an offer of employment, Shahar filled out the required application for a staff attorney position. In response to a blank denominated "marital status," Shahar stated that she was "engaged." She altered a blank for "spouse's name" to read "future spouse's name" and filled in her female partner's name. She also answered "yes" to the question "[d]o any of your relatives work for the State of Georgia?" and listed her partner's name as "future spouse." (Shahar Dep. 67, Exh. 5) (App. 14a)

Shahar informed two attorneys and a legal assistant at the Department of Law that she was planning a wedding ceremony with her same-sex partner. (Shahar Dep.

86-87) She also told a Deputy Attorney General, Robert Coleman, in a telephone conversation that took place in the first week of June 1991, that she was "getting married" at the end of July, changing her name, and taking a trip to Greece after the wedding. Shahar did not tell the Deputy Attorney General, however, that she was "marrying" another woman. (Coleman Dep. 31-34)

A Senior Assistant Attorney General, Jeffrey Milsteen, was in Mr. Coleman's office during this telephone call and recalled Mr. Coleman offering his congratulations to Shahar and her "husband"-to-be. (Milsteen Dep. 56-57) Shahar did not disabuse the Deputy Attorney General of this natural, albeit erroneous, assumption that she was marrying a man. (Coleman Dep. 51)

Shortly thereafter, Milsteen relayed the news of Shahar's impending marriage to another attorney in the office, Susan Rutherford, who informed Milsteen that she already knew of Shahar's plans to "marry," and that she was going to be "marrying" her female partner. Rutherford had seen Shahar and her partner in a restaurant where "they were working on their wedding vows or invitations or something to do with their wedding." (Milsteen Dep. 59)

Upon learning the "marriage" was going to be to another woman, Milsteen went to talk to his co-chair of the summer clerkship committee and expressed great concern that:

> [T]his was going to create a problem for the office. That given the kind of profile the office has in certain cases, I guess most particularly the *Hardwick* (*Bowers v. Hardwick*, 478 U.S. 186

> (1986)) case, but in others that we have dealt with, I was concerned about the impact this would have on the office. And I indicated that I felt I needed to tell the folks downstairs what was going on.

(*Id.* at 61)

Milsteen informed Deputy Attorney General Coleman, who expressed surprise and suggested that a number of the Attorney General's senior staff meet to discuss the matter. (*Id.* at 64) The Attorney General was not in the office that week. (*Id.* at 66-67) In his absence, all concurred that Shahar's employment at the Department of Law created a problem for the office. As an example, Milsteen explained: "I think the office would be in a hard position to stand up and argue the *Hardwick* case . . . if individuals of the same sex were married – however you define that – to each other and that was public knowledge." (Milsteen Dep. 70; Coleman Dep. 53-55)

The senior lawyers also reviewed Shahar's resume and application and noted a comment in her summer clerkship evaluations that she seemed better suited for a public-interest law position. In light of that comment, the lawyers viewed Shahar's same-sex "marriage" as "consistent with this interest in being active in public interest areas, and . . . inconsistent with the constraint placed on people in the office." (Milsteen Dep. 79) "[T]he comments in the evaluation took on a greater importance and a greater meaning. . . . " (*Id.* at 80) There were also concerns expressed that Shahar might attempt to claim "employment related benefits" for her partner. (*Id.* at 76-77)

Upon his return to the office, Respondent Bowers had several conversations, collectively and individually, with his senior staff as well as with a handful of other Department attorneys. After much dialogue, the Attorney General concluded, with the consensus of his senior staff, that he should withdraw Shahar's offer.

In reaching this conclusion, the Attorney General determined that Shahar's public status as "married" to another woman was likely to:

> (1) affect her, and ultimately the Department's credibility both in the public's eyes and in the eyes of judges around the State of Georgia; (Bowers Dep. 76-78, 95; Coleman Dep. 80-81; Manis Dep. 36-37)
>
> (2) interfere with the Law Department's ability to handle such controversial matters as cases involving claims to a same-sex marriage license, homosexual parental rights, employee benefits, insurance coverage for "domestic partners," and so forth; (Bowers Dep. 43, Michael Dep. 16-17)
>
> (3) interfere with the Department's efforts to enforce Georgia's sodomy law, O.C.G.A. § 16-6-2, which members of the public could reasonably assume Shahar was permitted to violate without prosecution or even investigation; (Bowers Dep. 42; Manis Dep. 47) and
>
> (4) generally create difficulties within the Law Department, which were likely to harm the public perception of the Attorney General's office and, in turn, likely to disrupt the Attorney General's ability to enforce Georgia laws. (Bowers Dep. 42, 46; Manis Dep. 37)

In addition to these concerns, Bowers and others on his staff had serious doubts about Shahar's judgment and sensitivity because of her apparent lack of appreciation for the need to avoid embroiling the Department of Law in controversial issues.

Over a month after the Department first learned of Shahar's planned "marriage," the Attorney General withdrew his offer of employment. In a letter dated July 10, 1991, and delivered to Shahar by Deputy Attorney General Coleman, the Attorney General informed her of his decision:

> This action has become necessary in light of information which has only recently come to my attention relating to a purported marriage between you and another woman. As the chief legal officer of this state, inaction on my part would constitute tacit approval of this purported marriage and jeopardize the proper functioning of this office.

(Shahar Dep. Exh. 7)

B. PROCEEDINGS BELOW

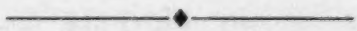
The district court granted summary judgment in favor of Respondent Bowers on all of Shahar's claims. *Shahar v. Bowers*, 836 F. Supp. 859 (N.D. Ga. 1993).

Shahar appealed the judgment of the district court and on December 20, 1995, a panel of the United States Court of Appeals for the Eleventh Circuit held that Shahar's relationship with her partner was a constitutionally protected intimate association and that any burden upon that association was subject to strict scrutiny.

The panel vacated the district court's grant of summary judgment and remanded to the district court for a determination under strict scrutiny whether Respondent Bowers' action had infringed Shahar's constitutional rights. In addition, two members of the panel (Senior Circuit Judges Godbold and Morgan) voted to remand Shahar's expressive association claim for evaluation, also under strict scrutiny standards. *See Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995), *vacated and rehearing en banc granted*, 78 F.3d 499 (11th Cir. 1996).

The court of appeals granted rehearing *en banc*, and on May 30, 1997, entered judgment in favor of Respondent Bowers. In doing so, the court assumed without deciding that Shahar's relationship was a constitutionally protected intimate association and that the relative interests of Shahar and the Attorney General would be placed in the scales for *Pickering* balancing. *Pickering v. Board of Education*, 391 U.S. 563 (1968). The court assigned Shahar's interests "substantial weight." (Pet. App. 28a) That weight, however, was insufficient to overcome the governmental interests in an effective, efficient and credible Department of Law, and the court held that Respondent Bowers' action was, therefore, not constitutionally prohibited. (Pet. App. at 36a)

Shahar petitioned for rehearing and to supplement the record, which the Court of Appeals denied. (Pet. App. 1a-7a)



REASONS FOR DENYING THE WRIT

A. INTRODUCTION

In this government-employment case, Petitioner Robin Shahar asks this Court to determine whether the Eleventh Circuit correctly held that the Attorney General of Georgia did not violate Petitioner's constitutional rights when he withdrew a job offer because of her purported "marriage" to another woman. Petitioner makes no claim that the Eleventh Circuit's decision conflicts with any applicable decision of the Court or any other lower court; at most, Petitioner claims only an abstract "conflict" in "principles." (Pet. 15) Even so, it is plain that the Eleventh Circuit's decision was extraordinarily faithful to, not in conflict with, the principles articulated by this Court's decisions. Certiorari should be denied.

I. This Case Does Not Present Issues Worthy Of Review By This Court.

Petitioner has shown no basis for review. Despite her claim that the Eleventh Circuit's decision represented a "conflict" in "principles" with decisions of this Court, it is readily apparent that Petitioner is asking this Court for plenary error correction; indeed, she states that she is asking this Court to "grant review and correct the Eleventh Circuit's error." (Pet. 18) Even so, as discussed in detail below, it is plainly apparent that the carefully considered decision of the Eleventh Circuit was neither "erroneous" nor in conflict with principles established by this Court. The court of appeals ultimately ruled against the Petitioner after weighing the competing interests of the parties; but, the Eleventh Circuit's assumption that

her asserted (though dubious) rights were entitled to substantial weight did no harm to Petitioner's cause. Indeed, the assumption of these doubtful rights was a benefit for which she should not be heard to complain. Moreover, Petitioner does not assert the Eleventh Circuit's decision is in any way conflicting with that of another circuit court of appeals, or has "departed from the accepted and usual course of judicial proceedings" so as to call for this Court's supervision. Rule 10(a), Supreme Court Rules. Additionally, it is evident that the decision below was heavily dependent upon the particular facts of the case. Ordinarily, such fact-bound decisions are not worthy of certiorari jurisdiction. *United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.")

II. The Court Of Appeals Did Not Err In Assuming The Existence Of A Constitutionally Protected Right Of Intimate Association In The Context Of This Case, Assigning That Assumed Right Substantial Weight, And Placing It In The *Pickering* Balance.

Remarkably, Petitioner complains that the Court of Appeals erred in only assuming the existence of her asserted constitutional right of intimate association in the context of this case, and argues that its failure to elaborate on the largely subjective characteristics of her relationship precluded the court from giving fair weight to her side of the *Pickering* balance. This claim has very little to do with the Petitioner's case, but very much to do with her cause: constitutional recognition and protection of

same-sex marriage.[2] Petitioner is seeking a judicially created constitutional right which would be a cornerstone for the construction of a new social order in the United States, wherein marriage, in the traditional and accepted sense, loses its exclusivity in terms of constitutional protections and governmental fostering, and each individual subjectively determines the degree of constitutional protection his or her relationship engenders. Adjudication of what Petitioner seeks was unnecessary to the Eleventh Circuit's decision, and is unnecessary in this Court.

A. Reserving Judgment On The Existence Of The Asserted Rights, And Instead Assuming Their Being, Was A Proper Exercise Of The Court Of Appeals' Discretion To Avoid Premature Constitutional Adjudication.

The court of appeals found it doubtful that Petitioner's relationship with her same-sex partner was constitutionally protected at all. (Pet. App. 11) Judge Tjoflat in his special concurrence would have held that the relationship does not enjoy such protection. (App. 44) Of course, one of the reasons for the majority's doubt, and Judge Tjoflat's firm conclusion, is that "same-sex marriages have never played a role, critical or otherwise, in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs." *Roberts v.*

---

[2] Petitioner has contended that she has never sought legal recognition of her relationship. Ironically, however, she seeks the ultimate protection of the law by having this Court catalogue her "marriage" among those rights protected by our constitution.

United States Jaycees, 468 U.S. 609, 618-19 (1984). Moreover, the court below found Shahar's claim to a protected expressive association doubtful because her religion does not require lesbians to marry other females, or even to marry at all. (Pet. App. 11a)

With respect to her claim of a protected right of intimate association, whether that right emanates from the Due Process Clause (*Zablocki v. Redhail*, 434 U.S. 374 (1978); *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986)), as Respondent has contended, or the penumbras of the Bill of Rights (*Griswold v. Connecticut*, 381 U.S. 479 (1965)), or has some foundation in the First Amendment (*Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537, 545 (1987) (dictum)), it is clear that the asserted right is not unlimited. *Roberts, supra* at 619. There must be a reasoned mechanism for determining whether a particular relationship is worthy of constitutional recognition, and if so, to what degree. This Court's decisions teach that our traditions, our history, and our collective moral aspirations as a Nation provide the boundaries for this constitutional protection. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Washington v. Glucksberg*, 117 S. Ct. 2262 (1997).

In *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Court recounted its uninterrupted history of recognition that marriage, in its traditional sense, is a fundamental liberty, a right of privacy protected by the Due Process Clause of the Fourteenth Amendment. The Court quoted from *Maynard v. Hill*, 125 U.S. 190 (1888) where it described marriage as . . . " 'the most important relation in life,' *id.* at 205, and as 'the foundation of the family and of society, without which there would be neither civilization nor

progress,' *id.* at 211." *Zablocki*, 434 U.S. at 384. In *Mayer v. Nebraska*, 262 U.S. 390 (1923), marriage, establishing a home and raising children, were recognized as central to liberty, and in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), marriage was described as a basic civil right "fundamental to our very existence and survival." *Id.* at 541.

In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), a plurality of the Court observed that the Constitution protects the family "precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Id.* at 503-04. *See also Smith v. Organization of Foster Families*, 431 U.S. 816 (1977).

In *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), the Court found that fundamental constitutional rights which may not be explicitly found in the text of the constitution must, therefore, be those liberties which are "implicit in the concept of ordered liberty." Without such parameters, the creation of new and doubtful fundamental rights would be no more than "the imposition of the Justices own choice of values. . . . " *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986). As is evident from the Petition, Shahar would have this Court forsake the safeguards of tradition, history, culture, and the values which emanate therefrom in exchange for a regime of individualized, subjective and unguided constitutional interpretation.

The court below, nonetheless, gave Shahar the benefit of its doubt, and assumed her relationship to be a

constitutionally protected intimate association. This the court was entitled, though not required, to do.

As this Court has indicated, "a fundamental long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." [citations omitted] *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445-46 (1988). The Court has described the principle as having an importance which "transcends the significance of particular controversies." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294 (1981). In *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947), the Court explained the multifaceted need for this policy, such as the magnitude of potential consequences arising from constitutional adjudications, separation of governmental powers and concern for the ultimate preservation of private rights. (" . . . it is not altogether speculative that a contrary policy of accelerated decision might do equal or greater harm for the security of private rights, without attaining any of the benefits of tolerance and harmony for the functioning of the various authorities in our scheme." *Id.* at 570-72).

Application of this principle by the court of appeals was appropriate in this case and it was not in error by merely assuming the existence of the asserted rights.

B. The Court Of Appeals Did Not Err In Weighing Petitioner's Asserted Intimate Association.

The court below assigned Shahar's assumed interests "substantial weight," even in the face of their doubtful

validity. (Pet. App. 28a) In addition, the court below reviewed the objective characteristics of her relationship, contrary to Petitioner's claim. For example, the court noted the following objective facts about Shahar's "marriage":

1. Shahar was "married" to another woman in a ceremony performed by a rabbi within the Reconstructionist Movement of Judaism; (Pet. App. 13a)

2. Although Shahar claims the marriage has no legal effect, she and her partner consider themselves "married;" (Pet. App. 13a)

3. Her wedding was announced in her synagogue; (Pet. App. 14a)

4. She and her partner invited 250 people to the wedding, including two Department of Law employees; (Pet. App. 14a)

5. Shahar's wedding invitations described the wedding as a "Jewish, lesbian-feminist, out-door wedding;" (Pet. App. 14a)

6. Petitioner and her partner exchanged wedding rings; (Pet. App. 29a)

7. Shahar and her partner legally changed their names to Shahar in conjunction with their "marriage;" (Pet. App. 29a)

8. Shahar disavowed a right to employment benefits from the Department based on her "marriage;" (Pet. App. 28a)

9. Shahar holds herself out as "married;" (Pet. App. 29a)

10. Shahar and her partner sought and received a married rate on their insurance; (Pet. App. 29a) and

11. Shahar and her partner jointly own the house in which they cohabit. (Pet. App. 29a)

Shahar apparently wants a closer inquiry into the subjective nature of the relationship, the depth of affection, and the personal gratification she receives. Such inquiry has no place in *Pickering* balancing, or any other consideration of intimate associations. As Justice Brennan stated in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), such claims must be evaluated by a "careful assessment of . . . [the] relationship's objective characteristics." *Id.* at 620. Moreover, this Court in *Waters v. Churchill*, 511 U.S. 661 (1994) recognized that under *Pickering* balancing, courts must "look to the facts as the employer reasonably found them to be," and must accord the government employer's reasonable predictions of disruption substantial weight. *Id.* at 677. The Eleventh Circuit was faithful to this precedent, properly finding the Attorney General's decision within the "broad range of reasonable assessments of the facts". (Pet. App. 26a) No error or conflict in principle is present here.

C. The Court Of Appeals Did Not Err In Weighing Shahar's Asserted Expressive Association.

Petitioner complains that the court of appeals viewed her asserted expressive association too narrowly, as "co-extensive and inseparable" (Pet. 21) from her free exercise claim, and suggests that the court should have given

more weight to the more subjective cultural or social aspects of her association. The court, however, did give due consideration to these asserted expressive attributes of her relationship, assigned "substantial weight" to the interest, and still found it outweighed by the government's interests in this case.

As a matter of case history, the district court found Shahar's "expressive association" claim offered her no greater protection than her intimate association claim, and found it to "overlap" her free exercise of religion claim. *Shahar v. Bowers*, 836 F. Supp. at 862, 866. (Pet. App. 135a). The Court of Appeals properly followed suit. (Pet. App. 11a).

Shahar's "expressive association" claim does not further First Amendment speech interests. *Roberts, supra* at 618, 622. Indeed, she contends she has taken no action to convert her intimate association into a public or political statement. (Petition at p. 22; Shahar's En Banc Brief at 41) Aside from the obvious religious aspects to her wedding and the fact of the "marriage" itself, the objective evidence about her marriage (enumerated above) recounts no more than events in Shahar's daily life. While living together as same-sex "spouses" may raise theoretical issues of intimate association, it is hardly protected by the First Amendment as speech, much less speech on a matter of public concern. *See Connick v. Myers*, 461 U.S. 138 (1983). Therefore, the lower court did not commit error harmful to Petitioner in equating and overlapping Shahar's expressive association claim with her free exercise claim.

III. The Court Of Appeals Properly Considered Respondent's Reasonable Predictions And Information Which Was Unknown To Respondent At The Time The Offer Of Employment Was Withdrawn.

Shahar complains that it was error for the court below to consider what she calls "uninvestigated speculation" and after-acquired evidence. (Pet. 22-25) She does recognize the legitimacy, however, of considering a public employer's "reasonable predictions of [future] disruption." *Waters v. Churchill*, 511 U.S. 661 at 673 (1994). The court of appeals concluded the after-acquired evidence was relevant to the reasonableness of the Attorney General's predictions in this case:

> We recognize that some of these acts (the exchange of rings, the insurance and property ownership) may not have been known by the Attorney General when he decided to withdraw Shahar's offer. We can still consider them. First, these additional facts do not change the reason – Shahar's "wedding" and "marriage" – for the withdrawal of the job offer. Second . . . the facts of Shahar's subsequent conduct are evidence of the reasonableness of the Attorney General's concerns (about potential public knowledge and perception). . . . "

(Pet. App. 30a, n. 21)

The court of appeals further found the after-acquired evidence relevant in light of Shahar's claim to reinstatement to employment in the Department, citing *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 362 (1995).

Shahar's argument on after-acquired evidence is circular. On the one hand, she urges the court to consider more carefully and give more weight to evidence relating to the characteristics of her relationship, such as the information enumerated in Part II, B above. Much of this evidence was derived through discovery and was not known at the time the offer was withdrawn.

On the other hand, however, Shahar objects to the court considering much of this same evidence because only Shahar, and Shahar alone, could be a proper predictor of public reaction to her purported "marriage." (Petition at 24) Presumably, Petitioner is contending that she could control public and departmental reaction to her "marriage" by explaining that she was expressing only private points of view, and by refraining from making detrimental statements about the Department of Law or deceiving the public about the nature of her "marriage." (*Id.*) This is speculation at best, and does not meet any criteria for reasonableness.

Petitioner argues that the court credited the Attorney General's predictions as reasonable without sufficient factual foundation, and states as an example the conclusions that "Shahar 'seemingly did not appreciate the importance of appearances and the need to avoid bringing "controversy" to the Department' and that Shahar would 'hold herself out as "married" in a way that would confuse the public as to her relationship's legal status and the Department's legal positions.' App. 26a, 29a." (Petition at 24) However, the record is replete with evidence, known to Attorney General Bowers at the time the offer was withdrawn, which is compelling in its support of the Attorney General's predictions. For example, Shahar

filled out her employment application, a public document in Georgia, to indicate her partner was her "future spouse" and that she was "engaged." (App. 14a) She had informed attorneys in the office of her "wedding" plans. She telephoned Deputy Attorney General Coleman and told him she was getting married, changing her name, and going on a wedding trip to Greece. In 1986, the Attorney General had successfully defended Georgia's sodomy statute in the context of homosexual activity. *Bowers v. Hardwick*, 478 U.S. 186 (1986). One staffer who had evaluated Shahar during her clerkship was of the opinion that she might be better suited to a "public interest" practice than to the Attorney General's office. Given the totality of these circumstances, it is not difficult at all to conclude Shahar either lacked sensitivity to the effect of appearances and the need to avoid bringing controversy to the Department or, as the course of this litigation certainly suggests, was bent upon an agenda of her own.

The after-acquired evidence significantly bolsters these conclusions and highlights the reasonableness of the predictions that Shahar's "marriage" might well disrupt the operations of the office and the fulfillment of its duties. The litany of issues dealt with by the Department of Law as recounted in footnote 16 of the *en banc* opinion (Pet. App. 24a) proves these conclusions were more than "speculation." In 1991, one did not need a crystal ball to predict the controversial issues our nation (and the State of Georgia) would face concerning same-sex couples and their efforts to capture expanded recognition and protections. Indeed, Respondent Bowers was concerned about these issues in 1986 in the *Hardwick* case. *See* Official

Transcript of Oral Argument, *Bowers v. Hardwick*, Case No. 85-140, March 31, 1988, p. 16. (" . . . if the Eleventh Circuit's decision is affirmed . . . this court will quite soon be confronted with questions concerning the legitimacy of statutes which prohibit polygamy, *homosexual, same-sex marriage*, consensual incest, prostitution, fornication, adultery. . . . ")

To suggest that Shahar's holding herself out as "married" to another woman would not predictably embroil the Department of Law in controversy, given the legal backdrop of *Bowers v. Hardwick* and the agency's other involvement in many closely related issues, is either supreme naiveté or disingenuous. In any event, it is entitled to no validation by the Court.

IV. Respondent Bowers' Withdrawal Of Shahar's Job Offer Was Based Upon Her Actions In Holding Herself Out As Married To Another Woman, And Was Not Precipitated By Some Generalized Animus Against Homosexuals.

Shahar claims that this case is about "status-based reaction to and exaggeration of conduct." (Petition at 28) She asserts that the Attorney General's predictions of disruption and controversy within the Department of Law are born of some discriminatory animus against her based upon her homosexuality. Both the district court and the court of appeals rejected this argument as unsupported by the evidence. (Pet. App. 129a-130a; App. 36a.) To the contrary, the evidence demonstrated that Attorney General Bowers had never inquired about the sexual preference or practices of any applicant or employee, and

made no such inquiry of Shahar. Shahar was hired *after* she told her supervisor and other employees that she was a lesbian. (Shahar Dep. 53-55) The Attorney General's past employment practices demonstrated the fact that sexual orientation did not form the basis of employment decisions. On one occasion, Respondent Bowers was told a staff attorney was involved in a homosexual relationship and was using his position in the Department to protect his same-sex partner. After it was determined that there had been no abuse of office by the staff attorney, the Attorney General did not investigate further to confirm or eliminate the existence of the same-sex relationship. (Bowers Dep. 104-08)

On the record before this Court, the only class Shahar can claim membership in for equal protection purposes is the class of individuals who hold themselves out as "married" to a member of the same sex. She does not make that claim at all. Instead, in a patent effort to expand this case beyond its legitimate issues, Shahar claims discrimination based on her status, and asserts that the Court's decision in *Romer v. Evans*, 517 U.S. ___, 116 S. Ct. 1620 (1996), requires that her claim be accepted. *Romer*, of course, is about discrimination based purely and simply on status, and in the context of that case, status discrimination without any rational relationship to a legitimate government interest. *Romer* did not involve decisions based upon the actions of individuals, as is the case here. Moreover, *Romer* did not involve the specific interest the government has as an employer when reacting to actions of employees, that jeopardize the smooth and efficient operation of its agencies. *Romer* involved a measure which was found to bear no relation whatsoever to a

legitimate public policy or other identifiable legitimate purpose.

Romer, however, does teach that for homosexuals as a class, the rational basis test is appropriate. If Shahar's claim that she was discriminated against because of her homosexuality were to be credited by the Court, then the Attorney General's action against her would be judged by that standard, and, it is submitted, successfully so. Respondents have already articulated legitimate governmental interests served by the withdrawal of the offer of employment in this case. *Kadrmas v. Dickinson Public School*, 487 U.S. 450, 462-63 (1988). The Attorney General's action was, at a minimum, rationally related to the legitimate (indeed, compelling) interests of governmental effectiveness and efficiency, as well as public confidence in the people's governmental agencies. Therefore, Shahar's claim that she has been the victim of discrimination on the basis of her status, even if accepted by the court, would profit her nothing.

CONCLUSION

As the court of appeals stressed in the *en banc* opinion, this case involves the proper resolution to conflict arising between the government's interests as an employer and the employee's exercise of asserted fundamental constitutional rights. Although the context of the asserted rights in this case may be new and unusual, the mechanism for balancing the competing interests is well established and well understood. *Pickering v. Board of Education* has been constantly applied since 1968, and this case presents no

reason to revisit it or otherwise expand upon its eminently workable rule. At best, the petition in this case seeks to have this Court micromanage the *Pickering* process in conjunction with Shahar's clear goal of establishing constitutional protection for same-sex marriage.

This case does not present any of the traditional factors which justify the exercise of the Court's discretion to grant the Writ of Certiorari. There is no conflict in the circuits and no conflict between the *en banc* opinion and any decision of this Court. There is no indication in the record that the unusual facts of this case are likely to be repeated often across the nation, or that the issues here are anything more than "episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). As is evident from the court of appeals' opinion, there is no need to definitively determine the existence of the rights asserted by Shahar, or, if they do exist, to place those rights in a particular location in the spectrum of affiliations protected by the constitution. By assuming that Shahar's assertions were entitled to substantial weight, the *en banc* court gave her a great benefit, the benefit of tremendous doubt. Even with that benefit, the interests of the people of Georgia in an efficient, effective and credible Department of Law far outweigh her claimed right to hold herself out as married to another woman. The Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL E. HOBBS
Counsel of Record
Counsel to the Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-2218